(3)

Supreme Court, U.S.
FILED
MAY 7 - 2004
OFFICE OF THE CLERK

No. 03-1125

In the

Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT NATURAL RESOURCES DEFENSE COUNCIL, INC.

ANDREW G. FRANK
Counsel of Record
GAINES GWATHMEY III
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
Attorneys for Respondent Natural Resources Defense Council, Inc.

BEST AVAILABLE COPY

NANCY K. STONER
NATURAL RESOURCES DEFENSE
COUNCIL, INC.
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-6868
Attorney for Respondent Natural Resources Defense Council, Inc.

QUESTIONS PRESENTED

The Environmental Protection Agency (EPA) promulgated the Phase II stormwater rule to regulate pollutant discharges from certain small municipal separate storm sewer systems (MS4s). The rule gives the MS4 operator a choice between two compliance options. Under one option, the MS4 has the freedom to design its own pollution reduction program by selecting control activities within six broad categories, but must enact certain ordinances or other regulatory mechanisms. Under the alternative, the MS4 may obtain an individual permit that does not require the MS4 operator to regulate third parties. In the past, EPA has offered such alternative permits to MS4s under the authority of the same regulations that now serve as the basis for the alternative compliance option under the Phase II rule.

The questions presented are:

1. Whether the court of appeals correctly found that the Phase II rule does not violate the Tenth Amendment because the rule does in fact provide MS4s with a compliance alternative that does not require regulation of third parties.

2. Whether the court of appeals correctly held that the canon of construction requiring a clear statement of congressional intent when statutory interpretations raise significant federalism questions does not invalidate the Phase II rule, because the canon does not apply when there is no serious constitutional issue, and EPA's inclusion of the alternative permit option removes any doubt as to whether the rule violates the Tenth Amendment.

LIST OF PARTIES

Petitioner is the Texas Cities Coalition on Stormwater (Texas Cities). The Texas Counties Storm Water Coalition (Texas Counties) also filed a petition for review of the Phase II rule and filed joint briefs with the Texas Cities in the court of appeals. For the purpose of the proceedings before this Court, the Texas Counties wish to remain a party and have adopted the position of the Texas Cities, but will not file separate papers. Respondents are EPA and the respondent-intervenor in the court of appeals, the Natural Resources Defense Council, Inc. (NRDC).

The Environmental Defense Center, the American Forest & Paper Association and the National Association of Home Builders filed petitions for review of the Phase II rule on issues different from those presented in this petition for writ of certiorari. Those three entities did not intervene in the Texas Cities' petition for review and are therefore not parties to these proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, NRDC states that it is a New York nonprofit corporation that has no parent corporation. It further states that no publicly held company owns any of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Stormwater Pollution and the Stormwater Provision of the Clean Water Act – Section 402(p) 2

B. The Phase I Rule 4

C. The Fifth Circuit's Decision in *City of Abilene* 5

D. The Phase II Rule 7

E. The Court of Appeals' Decision in This Case 9

REASONS FOR DENYING THE PETITION 11

Page

I. THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' FINDING THAT THE PHASE II RULE DOES NOT VIOLATE THE TENTH AMENDMENT BECAUSE THE RULE PROVIDES A COMPLIANCE ALTERNATIVE THAT DOES NOT REQUIRE MS4 OPERATORS TO REGULATE THIRD PARTIES 12

II. THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE PHASE II RULE IS CONSISTENT WITH THE CLEAR STATEMENT CANON OF CONSTRUCTION THAT GOVERNS WHEN A STATUTORY INTERPRETATION RAISES SERIOUS FEDERALISM QUESTIONS 15

A. The Court of Appeals Applied the Same Authority – *SWANCC* – that the Texas Cities Assert This Court Should Apply and Correctly Held That the Phase II Rule Is Fully Consistent with the Clear Statement Canon 16

B. Because the Texas Cities Did Not Previously Argue That EPA Had a Duty to Provide Additional Information About the Alternative Permit Option, This Argument Is Not Properly Before This Court 20

CONCLUSION 21

APPENDICES

40 C.F.R. § 122.26(d) (excerpts) ..... App. 1

40 C.F.R. § 122.33(b)(2) (excerpts) ..... App. 11

TABLE OF AUTHORITIES

Page

CASES

Chevron, U.S.A., Inc. v. *NRDC*, 467 U.S. 837 ..... 6, 10, 16

City of Abilene v. *EPA*, 325 F.3d 657 (5th Cir. 2003) 5, 6, 7, 16, 17

College Savings Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 20

Environmental Defense Center v. *EPA*, 319 F.3d 398 (9th Cir. 2003) 2, 9

Environmental Defense Center v. *EPA*, 344 F.3d 832 (9th Cir. 2003) ..... *passim*

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 19

NRDC v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) 3

New York v. *United States*, 505 U.S. 144 (1992) 6, 10, 18

Pennhurst St. Sch. & Hosp. v. *Haldermann*, 451 U.S. 1 (1981) 20

Pennsylvania Dep't of Corrections v. *Yeskey*, 524 U.S. 206 (1998) 20

Reno v. *Condon*, 528 U.S. 141 (2000) 6

Page

Solid Waste Agency of Northern Cook County v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) 5, 16, 17, 18

South Dakota v. *Dole*, 483 U.S. 203 (1987) 20

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 512 (1994) 15

STATUTES

Clean Water Act,

33 U.S.C. § 1342 3

33 U.S.C. § 1342(p) 2, 3

33 U.S.C. § 1342(p)(3) 5

33 U.S.C. § 1342(p)(3)(B)(ii) 18

33 U.S.C. § 1342(p)(3)(B)(iii) 18

33 U.S.C. § 1342(p)(4) 4

33 U.S.C. § 1342(p)(4)(A) 14

33 U.S.C. § 1342(p)(4)(B) 14

33 U.S.C. § 1342(p)(6) 4, 7

33 U.S.C. § 1362(14), ... 3

Page

Congressional Review Act of 1996,

5 U.S.C. § 801(a)(1)(A) 19

5 U.S.C. § 801(b)(1) 19

5 U.S.C. § 802 19

Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriation Act of 2000, Pub. L. 106-74 § 431, 113 Stat. 1047 (1999) 19

REGULATIONS

40 C.F.R. § 122.26(d) 2, 4, 14

40 C.F.R. § 122.26(d)(2)(iv)(B)(*1*) 4

40 C.F.R. § 122.26(d)(2)(viii) 4, 14, 15

40 C.F.R. § 122.30 2

40 C.F.R. § 122.33(b)(2)(ii) 2, 8, 15

40 C.F.R. § 122.34 2

40 C.F.R. § 122.34(b)(3)(ii)(B) 8

40 C.F.R. § 122.34(b)(4)(ii)(A) 8

40 C.F.R. § 122.34(b)(5)(ii)(B) 8

40 C.F.R. § 122.36 2

Page

ADMINISTRATIVE PUBLICATIONS

National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges, 55 Fed. Reg. 47990 (Nov. 16, 1990).....4

National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule, 64 Fed. Reg. 68722 (Dec. 8, 1999)...2, 3, 7, 13

In the

Supreme Court of the United States

TEXAS CITIES COALITION ON STORMWATER,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and NATURAL RESOURCES DEFENSE COUNCIL, INC.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NRDC respectfully requests that the Court deny the petition for a writ of certiorari to review the September 15, 2003, judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The final opinion below is *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). App. 1-92.[1] In issuing the final opinion, the Ninth Circuit vacated its initial opinion, re-

---

[1] Citations to "App." refer to the Appendix to the Texas Cities' petition for writ of certiorari.

ported as *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The relevant provision of the Clean Water Act (CWA), section 402(p), 33 U.S.C. § 1342(p), is reproduced at App. 93-97. The Phase II rule and its preamble were published at 64 Fed. Reg. 68722-68852. App. 98-166 (excerpts). The rule itself is codified at various sections of 40 C.F.R. parts 9, 122, 123 and 124. *See* App. 167-81 (setting forth certain provisions of the rule, including 40 C.F.R. §§ 122.30, 122.34 and 122.36); NRDC App. 11-12 (setting forth excerpts from 40 C.F.R. § 122.33(b)(2)(ii))[2]. Certain relevant provisions of EPA's Phase I stormwater rule are incorporated by reference in the Phase II rule. *See* NRDC App. 1-11 (setting forth excerpts from 40 C.F.R. § 122.26(d)).

STATEMENT OF THE CASE

A. Stormwater Pollution and the Stormwater Provision of the Clean Water Act – Section 402(p)

Urban stormwater discharges are a leading cause of water pollution. Uncontrolled discharges of polluted stormwater

---

[2] Citations to "NRDC App." refer to the Appendix to this brief.

from MS4s convey metals, pathogens, toxins, sediment, nutrients, trash and other pollutants to the waters of the United States. *National Pollutant Discharge Elimination System - Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule*, 64 Fed. Reg. 68722, 68744 (Dec. 8, 1999) (hereinafter Phase II Pream. & R.).

The cornerstone of the nation's water pollution control efforts is the National Pollutant Discharge Elimination System (NPDES) established under section 402 of the Clean Water Act, 33 U.S.C. § 1342. Under the NPDES regime, it is unlawful to discharge pollutants to the waters of the United States from a point source[3] without authorization to do so pursuant to a permit that sets conditions on the discharges.

Since the enactment of the Clean Water Act in 1972, most NPDES permits have relied on numeric effluent limits as the conditions that must be met to render the discharges lawful. Numeric effluent limits are quantitative "end of pipe" restrictions on the amounts or concentrations of pollutants that may be discharged.

In 1977, the District of Columbia Circuit held that storm sewers were point sources that EPA could not exempt from NPDES permitting requirements. *NRDC* v. *Costle*, 568 F.2d 1369, 1377, 1379 (D.C. Cir. 1977). EPA subsequently attempted to promulgate stormwater regulations in the 1970s and 1980s.

In 1987, Congress enacted section 402(p) of the Clean Water Act, 33 U.S.C. § 1342(p), App. 93-97. Among other things, that statute created a two-phase regulatory program for

---

[3] The Clean Water Act defines a point source as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

stormwater discharges. Section 402(p)(4) required that EPA establish regulations setting forth permit application requirements for stormwater discharges from large and medium MS4s, that is, MS4s serving populations of 100,000 persons or greater. 33 U.S.C. § 1342(p)(4), App. 95-96. Section 402(p)(6), in turn, required EPA to designate additional sources of stormwater pollution for regulation and to establish a comprehensive pollution control program for the designated sources. 33 U.S.C. § 1342(p)(6), App. 97.

B. The Phase I Rule

In 1990, EPA promulgated regulations under section 402(p)(4) for large and medium MS4s. Those regulations became known as the Phase I rule.[4] Consistent with the statute, the Phase I rule sets out permit application requirements for those MS4s. 40 C.F.R. § 122.26(d). Among the information that the Phase I rule requires in those permit applications is description of "a program . . . to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the [MS4]." 40 C.F.R. § 122.26(d)(2)(iv)(B)(*1*), NRDC App. 7. However, the rule also provides that the permitting authority can excuse an MS4 from certain of the application requirements, including the requirement that the MS4 describe its program to implement and enforce an illicit discharge ordinance, if the requirement is not "practicable" or "applicable." 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10.

---

[4] *National Pollutant Discharge Elimination System Permit Application Regulations for Stormwater Discharges*, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at various sections of 40 C.F.R. pts. 122-124).

C. The Fifth Circuit's Decision in *City of Abilene*

Since promulgation of the Phase I rule, EPA and other permitting authorities have issued Phase I permits to large and medium MS4s. In *City of Abilene* v. *EPA*, 325 F.3d 657 (5th Cir. 2003), *reh'g en banc denied*, 71 Fed. Appx. 443 (5th Cir. 2003), a unanimous panel of the Fifth Circuit upheld EPA-issued Phase I MS4 permits against two as-applied challenges. The first challenge was based on the canon of construction requiring a clear statement of congressional intent when a statutory interpretation raises serious federalism questions, as set out in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (hereinafter *SWANCC*). The second challenge was based on the Tenth Amendment.

In *City of Abilene*, EPA had offered the plaintiffs, two Texas cities, a choice between (1) permits that would have required the cities to implement and enforce ordinances or other programs to prevent the discharge of pollutants into their MS4s, and (2) permits containing numeric effluent limits. *Id.* at 660. The cities chose permits of the first type rather than numeric effluent limit permits. Upon issuance of the permits, the cities sought administrative and judicial review. The cities contended that the Clean Water Act did not provide sufficiently clear authority to allow EPA to require an MS4 operator to regulate third parties, and that such regulation of third parties "invoke[d] the outer limits of [federal] power," so that the permits violated the *SWANCC* clear statement canon of construction. *Id.*

In denying that challenge, the Fifth Circuit quoted section 402(p)(3) of the Clean Water Act, 33 U.S.C. § 1342(p)(3), which requires that MS4 permits include "a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and "controls to reduce the discharge of pollutants to the maximum extent practicable, including management prac-

tices, control techniques and system, design and engineering methods, and *such other provisions as the Administrator or the State [permitting authority] determines appropriate for the control of such pollutants.*" *Id.* at 660-61 (emphasis in original). Based on this statutory language, the Fifth Circuit concluded that "even if *Chevron* deference is not warranted, the challenged permit conditions are within EPA's discretion." *Id.* at 661 (referencing *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984)).

The Fifth Circuit also rejected the argument that the permits violated the Tenth Amendment because they required the cities to regulate third parties. *Id.* at 661-63. Following *New York* v. *United States*, 505 U.S. 144 (1992), the court stated that the federal government could encourage states and municipalities to implement a federal regulatory program so long as the choice to do so or not remained with the state or municipal government. *City of Abilene*, 325 F.3d at 662. As a result, the cities could not "establish a Tenth Amendment violation without demonstrating that they had no other option but to regulate [third parties] according to federal standards." *Id.* The Fifth Circuit concluded that EPA's offer of a numeric effluent limit permit gave the cities that other option:

> Like [the statute at issue in *Reno* v. *Condon*, 528 U.S. 141 (2000)], the proposed numeric end-of-pipe permits would not have required the Cities to regulate their own residents but instead, by requiring the Cities to meet effluent limitations, would have regulated them in the same manner as other dischargers of pollutants. Because the record shows that the Cities voluntarily chose the management permits over permits that did not require the Cities to regulate according to federal standards, the Cities have not been compelled to implement a federal regulatory scheme. Accordingly, their Tenth Amendment challenge fails.

Id. at 663.

D. The Phase II Rule

In 1999, EPA promulgated regulations under Clean Water Act section 402(p)(6), 33 U.S.C. § 1342(p)(6). Phase II Pream. & R., 64 Fed. Reg. 68722-852. Those regulations became known as the Phase II rule. Consistent with the statute, the Phase II rule designated certain stormwater dischargers for regulation – including certain small MS4s – and established a comprehensive permitting program to regulate them. The preamble to the rule listed approximately 5,700 cities or counties in "urbanized areas" that would be actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37. Certain federal facilities are also regulated under the Phase II rule's MS4 provisions. *Id.* at 68749.

The Phase II rule provides two compliance options. One option gives MS4 operators the freedom to design their own regulatory program by selecting pollution control activities from six broad categories referred to as the minimum measures.[5] App. 108 ("each permittee will determine appropriate [management practices] to satisfy each of the six minimum control measures"). EPA designed the rule in this way to provide "maximum flexibility in MS4 permitting" because "MS4s need . . . flexibility to optimize reductions in storm water pollutants on a location-by-location basis." App. 107. The six minimum measure categories are: (1) public education and outreach on stormwater impacts; (2) public involvement/participation; (3) illicit discharge detection and elimina-

---

[5] In ruling on a separate petition for review of the Phase II rule, the Ninth Circuit held that the MS4 operators' choice of pollution control measures must be reviewed by the permitting authority to ensure that the MS4 pollution control programs meet relevant statutory standards. App. 37-38. That issue is not before this Court.

tion; (4) construction site stormwater runoff control; (5) post-construction stormwater management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. App. 109-42.

Though the minimum measures approach provides flexibility, the MS4's minimum measure pollution control program must include certain features. For the illicit discharge, construction site, and new development and redevelopment minimum measures, the pollution control program must include certain ordinances or other regulatory mechanisms. 40 C.F.R. §§ 122.34(b)(3)(ii)(B), 122.34(b)(4)(ii)(A) & 122.34(b)(5)(ii)(B), App. 171, 172 & 174.

The alternative to the minimum measures approach under the Phase II rule allows regulated small MS4s to obtain individual permits under the Phase I rule's permit application requirements for large and medium MS4s. App. 152-53. EPA stated that those individual Phase II permits would "more specifically focus[ ] on the pollutants" discharged from the regulated MS4s, App. 157, and expressly noted that the permits could be based on numeric effluent limits. App. 158; *see also* App. 158-59 (explaining how appropriate effluent limits might be determined). EPA indicated that MS4 operators seeking permission to discharge under the alternative permit option did not need to submit details about future stormwater program requirements unless the MS4 operator intended that those future program components be considered when developing the permit conditions. App. 159; *see also* 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

EPA added the alternative compliance option in response to comments suggesting that the minimum measures approach might violate the Tenth Amendment by requiring the operators of MS4s to regulate third parties. App. 153-54. EPA explained that the minimum measures approach, standing

alone, did not excessively interfere with the functioning of municipal governments, and therefore did not violate the Tenth Amendment. App. 155-57. EPA further noted that, in any event, providing the alternative permit option resolved any Tenth Amendment concerns:

> Even if the minimum measures approach was constitutionally suspect, a requirement that standing alone would violate constitutional principles of federalism does not raise concerns if the entity subject to the requirement may opt for an alternative action that does not raise a federalism issue.

App. 157.

E. The Court of Appeals' Decision in This Case

In its September 15, 2003 revised opinion, a unanimous panel of the Ninth Circuit rejected the Texas Cities' clear statement and Tenth Amendment challenges to the rule.[6] App. 14-22.

---

[6] The court of appeals issued its original opinion, in which the entire panel rejected the clear statement challenge and a majority of the panel rejected the Tenth Amendment challenge, on January 14, 2003. *Environmental Defense Center* v. *EPA*, 319 F.3d 398 (9th Cir. 2003). Judge Richard C. Tallman dissented on the Tenth Amendment point, and on certain other points not relevant to this petition for writ of certiorari. The Texas Cities and Texas Counties filed a petition for panel and en banc rehearing on the clear statement and Tenth Amendment issues. On September 15, 2003, the court of appeals denied the Texas Cities' and Texas Counties' petition for panel and en banc rehearing, but issued a revised opinion. While continuing to uphold the rule against the clear statement and Tenth Amendment challenges, the court amended its opinion on those two points in the wake of the Fifth Circuit's *City of Abilene* decision, which had been issued after the Ninth Circuit's original decision in this action. Judge Tallman joined in the revised opinion on the Tenth Amendment point, making the revised opinion unanimous on both the

On the clear statement issue, as set out in more detail in section II.A below, the court of appeals ruled that EPA's statutory interpretations passed muster under the test for administrative deference set out in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984) as well as under *SWANCC*.

As for the constitutional issue, the Ninth Circuit, like the Fifth Circuit in *City of Abilene*, held that there is no Tenth Amendment violation when EPA offers MS4s at least one compliance alternative that does not require the state or municipality to regulate third parties. App. 19 (citing *New York* v. *United States*, 505 U.S. 144, 168 (1992)). Since under the Phase II rule MS4s may choose either the minimum measures approach or the alternative permit, the Ninth Circuit concluded that the rule would not violate the Tenth Amendment so long as the alternative permit option standing alone did not violate the Tenth Amendment's federalism guarantees. App. 20.

The court found that the alternative permit option did not offend Tenth Amendment principles because it did not compel MS4s to regulate third parties. The court recognized that the Phase I rule application requirements, which served as the application requirements under the alternative permit option, did require an MS4 to provide information concerning proposed ordinances or other regulatory measures. App. 20. But the court found that those application requirements did not "specif[y] the contents of the permit that will result from the application process." App. 20. Thus, "nothing in [the Phase I permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. In further support for its conclu-

---

clear statement and Tenth Amendment issues. Judge Tallman continued to dissent on other issues. No judge of the court of appeals requested a vote on the petition for en banc rehearing.

sion on this point, the Ninth Circuit noted that EPA had in fact already offered the Phase I cities at issue in *City of Abilene* "an option for obtaining permits that would not have involved . . . regulating third parties." App. 21. The court of appeals concluded that "by presenting the option of seeking a permit under [the Phase I permit application requirements], the Phase II rule avoids any unconstitutional coercion." App. 21-22.

REASONS FOR DENYING THE PETITION

The Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option requires MS4 operators to regulate third parties. The decision of the court of appeals creates no conflict of authority or important, unresolved question of law on this point, however. Both the Ninth Circuit, in this case, and the Fifth Circuit, in the *City of Abilene* case, have held that there is no Tenth Amendment violation when EPA provides MS4s with a compliance alternative that does not require MS4s to regulate third parties. The Texas Cities do not dispute this principle. Instead, the Texas Cities simply disagree with the court's finding that the Phase II rule provides MS4s with such an alternative. However, the Texas Cities invoke no interpretive principles in support of their reading of the regulation, and the plain language of the regulation is contrary to their position.

The Texas Cities also contend that the Phase II rule violates the clear statement canon of construction that governs when a statutory interpretation raises serious constitutional questions concerning the balance of authority between the federal and state governments. There is, however, no conflict of authority or important, unresolved question of federal law on this point either. The court of appeals applied the same decision of this Court – *SWANCC* – that the Texas Cities argue that

this Court should apply. Because the availability of the alternative permit option eliminates any purported Tenth Amendment concern, the court of appeals correctly decided that there was no serious constitutional question and thus that no clear statement was necessary. Moreover, the canon provides that statutes should be interpreted to avoid constitutional problems. The court of appeals' decision to uphold EPA's interpretation, which avoids any Tenth Amendment concerns by providing a compliance alternative that does not require MS4s to regulate third parties, is thus fully consistent with the canon.

In addition, the Texas Cities now argue, for the first time in this petition for writ of certiorari, that decisions of this Court obliged EPA to provide additional information about the compliance alternatives available to MS4s under the Phase II rule so that MS4 operators could "voluntarily and knowingly" choose between the alternatives. Because the Texas Cities never raised this argument in the proceedings in the court of appeals, the argument is not properly before this Court.

I.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' FINDING THAT THE PHASE II RULE DOES NOT VIOLATE THE TENTH AMENDMENT BECAUSE THE RULE PROVIDES A COMPLIANCE ALTERNATIVE THAT DOES NOT REQUIRE MS4 OPERATORS TO REGULATE THIRD PARTIES

In a careful application of this Court's jurisprudence, the Ninth Circuit agreed with the Fifth Circuit in holding that there is no Tenth Amendment violation if EPA offers MS4s a compliance alternative that does not require them to regulate third parties. No court has held otherwise, and the Texas Cities do not challenge that holding in this petition.

Instead, the Texas Cities contend that the Phase II rule violates the Tenth Amendment because the alternative permit option in fact requires MS4s to regulate third parties. Pet. at 27-30. According to the Texas Cities, because certain parts of the relevant regulations for the alternative permit option require that the MS4 provide information about proposed ordinances or other regulatory mechanisms in the permit application, the permits themselves must include ordinances or other similar regulatory mechanisms. *Id.* The court of appeals found to the contrary, and for several reasons this issue does not merit review by this Court.[7]

First, there is no conflict in authority or important, unresolved issue of law on this point. The Texas Cities' position is simply an argument that certain regulations mean something other than what their plain language states and what the agency charged with their interpretation says they mean. The Texas Cities admit that what they seek is correction of a purported "mistake," Pet. at 27, and simple correction of a mistake is not a sufficient ground for certiorari. The Texas Cities invoke no interpretive principles and cite only two cases – neither of which is a decision of this Court, and one of which is discussed solely for the purpose of arguing that it does not govern here.[8] Pet. at 27-30.

---

[7] The Texas Cities state that the rule "potentially affects more than 50,000 State and local governmental entities in the nation." Pet. at 27; *see also* Pet. at 14. However, the Texas Cities do not cite any source for this 50,000 figure. The rule itself identifies approximately 5,700 cities or counties actually or potentially subject to the rule. Phase II Pream. & R., 64 Fed. Reg. at 68812-37.

[8] The Texas Cities do suggest that EPA's interpretation caused the court of appeals to "misapply" *SWANCC* because both the minimum measures option and the alternative permit option allegedly require MS4s to regulate third parties, so that the rule raises "significant federalism issues." Pet. at

Second, the Texas Cities' position on the merits is not correct. The plain language of the relevant statute indicates that the Phase I rule provisions were to establish "regulations setting forth the permit application requirements" for large and medium MS4s. 33 U.S.C. § 1342(p)(4)(A) & (B), App. 95-96 The Phase I rule does exactly that: establish permit application requirements. *See, e.g.*, 40 C.F.R. 122.26(d), NRDC App. 1 (captioned "Application requirements for large and medium municipal storm sewer systems"). The court of appeals found that these regulations, which now also serve as the application requirements for the alternative permit option under the Phase II rule, did not "specif[y] the contents of the permit that will result from the application process." App. 20. As a result, "nothing in [the permit application requirements] will compel the operator of a small MS4 to implement a federal regulatory program or regulate third parties." App. 21. Citing *City of Abilene*, the court of appeals also noted that EPA has in fact already offered permits to MS4s that do not require the MS4s to regulate third parties. EPA did so, of course, under the Phase I permit application requirements that now apply to Phase II MS4s under the alternate permit option.

Additional support for finding of the court of appeals is found in the text of the regulations. The regulations give the permitting authority the power to excuse an MS4 from certain application requirements – including the requirement to describe the illicit discharge ordinance – if those requirements are not applicable or practicable, as they would not be for an alternative permit based on numeric effluent limits. 40 C.F.R. § 122.26(d)(2)(viii), NRDC App. 10. Moreover, the Phase II rule

---

30. As noted in section II.A below, however, the interpretation upheld by the court of appeals does not *create* a federalism issue, but in fact *eliminates* any alleged federalism issue, since the alternative permit option allows MS4s to avoid regulating third parties.

expressly provides that an MS4 applying for an alternative permit need not demonstrate its legal authority to enact such ordinances. 40 C.F.R. § 122.33(b)(2)(ii), NRDC App. 11-12.

The exceptions to the application requirements found in 40 C.F.R §§ 122.26(d)(2)(viii) and 122.33(b)(2)(ii) are consistent with EPA's statement, in the preamble to the Phase II rule, that MS4 operators seeking alternative permits do not need to provide information concerning such program requirements if they seek an alternative permit. App. 159. That agency interpretation of its own regulations is entitled to deference. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (administrative interpretation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). These exceptions are also, of course, consistent with the fact that the alternative permit option does not require MS4s to regulate third parties.

II.

THERE ARE NO GROUNDS FOR FURTHER REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE PHASE II RULE IS CONSISTENT WITH THE CLEAR STATEMENT CANON OF CONSTRUCTION THAT GOVERNS WHEN A STATUTORY INTERPRETATION RAISES SERIOUS FEDERALISM QUESTIONS

The Texas Cities argue that the Phase II rule is inconsistent with the canon of construction that requires a clear statement of congressional intent for statutory interpretations that raise serious constitutional issues regarding the balance of federal and state authority. Pet. at 16-17. Though the Texas Cities contend that the court of appeals' rejection of their clear statement challenge presents an issue of "immense importance" and constitutes a "radical departure from settled law," Pet. at 13, the court of appeals was able to resolve the challenge easily through a simple and correct application of the decision of this

Court – *SWANCC* – upon which the Texas Cities themselves rely.

A. The Court of Appeals Applied the Same Authority – *SWANCC* – that the Texas Cities Assert This Court Should Apply and Correctly Held That the Phase II Rule Is Fully Consistent with the Clear Statement Canon

The Texas Cities contend that EPA lacked statutory authority under *SWANCC*. *SWANCC* stands for the proposition that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. 531 U.S. at 173, 174.

The court of appeals held the rule to be a valid exercise of EPA's statutory authority under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). App. 16 n.18. However, to address the Texas Cities' argument that *SWANCC* governed, the Ninth Circuit also examined whether *SWANCC* invalidated the rule. *Id.* Similarly, in *City of Abilene*, the Fifth Circuit determined whether *SWANCC* invalidated the MS4 permits at issue in that case. 325 F.3d at 660-61. Both courts concluded that *SWANCC* did not invalidate EPA's actions. Given that the only two courts to examine this issue applied the same legal authority that the Texas Cities contend that this Court should apply and reached the same conclusion, the Texas Cities have no grounds to assert the existence of a conflict in authority or an unresolved question of law as a basis for certiorari.

Because there is no conflict of authority or unresolved question of law, the Texas Cities' position is simply that the court of appeals misapplied *SWANCC*. But the Ninth Circuit's holding that the Phase II rule did not violate the clear statement canon was correct. The court of appeals found that the Phase II rule did not present any serious constitutional problems be-

cause the existence of the alternative permit option eliminated any purported Tenth Amendment concerns. App. 16, n.18. As noted above, the Fifth Circuit agrees that there is no Tenth Amendment problem when EPA provides a compliance alternative that does not require MS4s to regulate third parties, and no court has disagreed.

The clear statement canon of construction only governs, however, when there *is* a serious constitutional issue. Accordingly, in the absence of a serious constitutional issue, the court of appeals correctly determined that the canon did not apply, and there was no need for a special clear statement authorizing the Phase II rule's choice of compliance alternatives. App. 16 n.18.

In particular, the canon applies in situations where the statutory interpretation at issue alters the traditional balance of federal and state authority. *SWANCC*, 531 U.S. at 173. The court of appeals found, however, that the Phase II Rule maintained, rather than altered, the existing balance of federal-state authority, given that (1) EPA's authority to regulate MS4s was established over a quarter of a century ago, and (2) EPA promulgated the Phase I rule over a decade ago. App. 16, n.18.

The court also noted that, "even if a clear statement of congressional intent were necessary, § 402(p) of the Clean Water Act is replete with clear statements that Congress intended EPA to require MS4s either to obtain . . . permits or to stop discharging stormwater."[9] *Id.*

---

[9] Applying *SWANCC*, the Fifth Circuit found that the Clean Water Act provided clear statements granting EPA discretion to impose permit conditions similar to those in the minimum measures. *City of Abilene*, 325 F.3d at 661. The Fifth Circuit cited Clean Water Act sections 402(p)(3)(B)(ii) and (iii), which provide that MS4 permits include "a requirement to effectively prohibit nonstormwater discharges into the storm sewers" and "controls to re-

Indeed, the court of appeals' decision to uphold the rule is fully consistent with the clear statement canon. As this Court has stated, the clear statement canon provides that statutes should be interpreted to avoid significant constitutional problems unless such an interpretation is plainly contrary to the intent of Congress. *SWANCC*, 531 U.S. at 173, 174.

In *New York* v. *United States*, 505 U.S. 144 (1992), this Court applied this affirmative aspect of the canon in a Tenth Amendment context. In that case, the Court confronted two interpretations of a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 ("LLRWPA"). Under one interpretation, the statutory provision was a mandate requiring states to enact and enforce a federal regulatory program in violation of the Tenth Amendment. Under the other interpretation, the statute provided a series of compliance alternatives. Applying the clear statement canon, the Court held that the latter interpretation was correct because the former was constitutionally problematic.[10] *Id.* at 170.

The court of appeals' decision here is fully consistent with *New York*. The court of appeals confronted two interpretations of the Phase II rule. Under the Texas Cities' interpretation, the Phase II rule is an unconstitutional reading of EPA's

---

duce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques . . . and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B)(ii) & (iii), App. 94.

[10] In *New York*, the Court ultimately found, of course, that the final alternative under the LLRWPA, the "take title" provision, did not provide a constitutional alternative. 505 U.S. at 176. Unlike the "take title" provision of the LLRWPA, however, the alternative permit option under the Phase II rule is not unconstitutional standing alone, because it allows MS4s to control pollutant discharges without requiring them to regulate third parties.

statutory authority, because, according to the Texas Cities, both the minimum measures option and the alternative permit option require MS4 operators to regulate third parties in violation of the Tenth Amendment. On the other hand, under EPA's interpretation, the rule is a constitutional reading of the statutory authority because the alternative permit option does not require MS4 operators to regulate third parties, and thus the rule offers a choice that does not violate the Tenth Amendment. The clear statement canon of construction requires that the court choose the interpretation that is least constitutionally problematic – EPA's interpretation – and the court of appeals did so. A decision by this Court to reverse the court of appeals' decision and reject EPA's interpretation would be directly contrary to the canon of construction, and thus there is no reason to grant the petition for writ of certiorari on this point.[11]

---

[11] Citing *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Texas Cities suggest that the court of appeals' decision "failed to ensure the efficacy of the procedural political safeguards" that protect state and municipal interests. Pet. at 22. The Texas Cities appear to be arguing that the court of appeals somehow ran roughshod over Congress' views on EPA's authority under the relevant statutes. *Id.* at 22-23.

The Texas Cities' invocation of *Garcia* makes no sense, however. Congress, like the court of appeals, declined to invalidate the Phase II rule. Prior to promulgation of the rule, at the behest of a Senator from Texas, Congress directed EPA to report on the proposed rule. Department of Veterans Affairs & Housing and Urban Dev. & Indep. Agencies Approp. Act of 2000, Pub. L. 106-74 § 431, 113 Stat. 1047 (1999) (enacting Hutchison Amend., 145 Cong. Rec. S11445 (Sept. 24, 1999)). Congress received that report when the EPA administrator signed the rule in October 1999 and would have received a copy of the rule itself pursuant to the Congressional Review Act of 1996, 5 U.S.C. § 801(a)(1)(A) (the "Review Act"). Nonetheless, Congress did not use its Review Act authority to invalidate the rule. 5 U.S.C. §§ 801(b)(1) & 802. NRDC respectfully suggests that this Court should not grant certiorari to vacate the rule on a clear statement challenge when Congress itself declined to vacate the rule.

B. Because the Texas Cities Did Not Previously Argue That EPA Had a Duty to Provide Additional Information About the Alternative Permit Option, This Argument Is Not Properly Before This Court

The Texas Cities now contend, for the first time, that the Phase II rule is invalid because EPA had a legal duty to provide additional information concerning the alternative permit option so that MS4 operators could "voluntarily and knowingly" choose between the two compliance options. Pet. at 25 (citing *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-84 (1999); *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Pennhurst St. Sch. & Hosp.* v. *Haldermann*, 451 U.S. 1, 17-18 (1981)). The Texas Cities did not make this argument before the court of appeals. Thus, it is not properly before the Court. *See, e.g., Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998).

Besides, even if the Texas Cities had made this argument before the court of appeals, the three decisions they cite do not concern the Tenth Amendment, so in any event there could be no direct conflict between the holdings in those cases and the Ninth Circuit's decision. *See College Savings Bank*, 527 U.S. at 680-84 (sovereign immunity); *South Dakota*, 483 U.S. at 207 (spending clause); *Pennhurst St. Sch. & Hosp.*, 451 U.S. at 17-18 (spending clause). Moreover, the rule and preamble do give MS4 operators sufficient information to make an informed choice between the minimum measures option and the alternative permit option.[12] *See generally* App. 100-160.

---

[12] In addition to the information EPA provided in the preamble to the rule, there is in general great familiarity with numeric effluent limit permits, which are available to MS4s under the alternative permitting option, since permitting authorities have been using numeric effluent limit permits for decades in a wide variety of contexts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW G. FRANK
Counsel of Record
GAINES GWATHMEY III
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

NANCY K. STONER
NATURAL RESOURCES DEFENSE
COUNCIL, INC.
1200 New York Avenue, N.W.
Washington, D.C. 20005
(202) 289-6868

Attorneys for Respondent Natural Resources Defense Council, Inc.

40 C.F.R. § 122.26(d) (excerpts)

(d) *Application requirements for large and medium municipal separate storm sewer discharges.* . . . Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

* * *

(2) *Part* 2. Part 2 of the application shall consist of:

(i) *Adequate legal authority.* A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

(A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

(ii) *Source identification.* The location of any major outfall that discharges to waters of the United States that was not reported under paragraph (d)(1)(iii)(B)(*1*) of this section. Provide an inventory, organized by watershed of the name and address, and a description (such as SIC codes) which best reflects the principal products or services provided by each facility which may discharge, to the municipal separate storm sewer, storm water associated with industrial activity;

(iii) *Characterization data.* When "quantitative data" for a pollutant are required under paragraph (d)(2)(iii)(A)(*3*) of this section, the applicant must collect a sample of effluent in accordance with 40 CFR § 122.21(g)(*7*) and analyze it for the pollutant in accordance with analytical methods approved under part 136 of this chapter. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

(A) Quantitative data from representative outfalls designated by the Director (based on information received in part 1 of the application, the Director shall designate between five and ten outfalls or field screening points as representative of the commercial, residential and industrial land use activities of the drainage area contributing to the system or, where there are less than five outfalls covered in the application, the Director shall designate all outfalls) developed as follows:

(*1*) For each outfall or field screening point designated under this subparagraph, samples shall be collected of storm water discharges from three storm events occurring at least one month apart in accordance with the requirements at § 122.21(g)(*7*) (the Director may allow exemptions to sampling three storm events when climatic conditions create good cause for such exemptions);

(2) A narrative description shall be provided of the date and duration of the storm event(s) sampled, rainfall estimates of the storm event which generated the sampled discharge and the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event;

(*3*) For samples collected and described under paragraphs (d)(2)(iii)(A)(*1*) and (A)(2) of this section, quantitative data shall be provided for: the organic pollutants listed in Table II; the pollutants listed in Table III (toxic metals, cyanide, and total phenols) of appendix D of 40 CFR part 122, and for the following pollutants:

Total suspended solids (TSS)
Total dissolved solids (TDS)
COD
BOD_5
Oil and grease
Fecal coliform
Fecal streptococcus
pH
Total Kjeldahl nitrogen
Nitrate plus nitrite
Dissolved phosphorus
Total ammonia plus organic nitrogen
Total phosphorus

(4) Additional limited quantitative data required by the Director for determining permit conditions (the Director may require that quantitative data shall be provided for additional parameters, and may establish sampling conditions such as the location, season of sample collection, form of precipitation (snow melt, rainfall) and other parameters necessary to insure representativeness);

(B) Estimates of the annual pollutant load of the cumulative discharges to waters of the United States from all identified municipal outfalls and the event mean concentration of the cumulative discharges to waters of the United States from all identified municipal outfalls during a storm event (as described under § 122.21(c)(7)) for BOD_5, COD, TSS, dissolved solids, total nitrogen, total ammonia plus organic nitrogen, total phosphorus, dissolved phosphorus, cadmium, copper, lead, and zinc. Estimates shall be accompanied by a description of the procedures for estimating constituent loads and concentrations, including any modelling, data analysis, and calculation methods;

(C) A proposed schedule to provide estimates for each major outfall identified in either paragraph (d)(2)(ii) or (d)(1)(iii)(B)(*1*) of this section of the seasonal pollutant load and of the event mean concentration of a representative storm for any constituent detected in any sample required under paragraph (d)(2)(iii)(A) of this section; and

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

(iv) *Proposed management program.* A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable. Proposed management programs shall describe priorities for implementing controls. Such programs shall be based on:

(A) A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

(*1*) A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

(2) A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from

municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

(3) A description of practices for operating and maintaining public streets, roads and highways and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

(5) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

(6) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits,

certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.

(B) A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include:

(1) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

(2) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

(3) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

(4) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

(5) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(6) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(7) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary;

(C) A description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, industrial facilities that are

subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and industrial facilities that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

(*1*) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

(2) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(*7*)(vi) and (vii).

(D) A description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system, which shall include:

(*1*) A description of procedures for site planning which incorporate consideration of potential water quality impacts;

(2) A description of requirements for nonstructural and structural best management practices;

(3) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and

(4) A description of appropriate educational and training measures for construction site operators.

(v) *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

(vi) *Fiscal analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

(vii) Where more than one legal entity submits an application, the application shall contain a description of the roles and responsibilities of each legal entity and procedures to ensure effective coordination.

(viii) Where requirements under paragraph (d)(1)(iv)(E), (d)(2)(ii), (d)(2)(iii)(B) and (d)(2)(iv) of this section are not practicable or are not applicable, the Director may exclude any operator of a discharge from a municipal separate storm sewer which is designated under paragraph (a)(1)(v), (b)(4)(ii) or (b)(7)(ii) of this section from such requirements.

The Director shall not exclude the operator of a discharge from a municipal separate storm sewer identified in appendix F, G, H or I of part 122, from any of the permit application requirements under this paragraph except where authorized under this section.

* * *

---

40 C.F.R. § 122.33(b)(2) (excerpts)

§ 122.33 If I am an operator of a regulated small MS4, how do I apply for an NPDES permit and when do I have to apply?

* * *

(2)(i) If you are seeking authorization to discharge under an individual permit and wish to implement a program under § 122.34, you must submit an application to your NPDES permitting authority that includes the information required under §§ 122.21(f) and 122.34(d), an estimate of square mileage served by your small MS4, and any additional information that your NPDES permitting authority requests. A storm sewer map that satisfies the requirements of § 122.34(b)(3)(i) will satisfy the map requirements in § 122.21(f)(7).

(ii) If you are seeking authorization to discharge under an individual permit and wish to implement a program that is different from the program under § 122.34, you will need to comply with the permit application requirements of § 122.26(d)(1) and (2) by March 10, 2003. You do not need to submit the information required by §§ 122.26(d)(1)(ii) and (d)(2) regarding your legal authority, unless you intend for

the permit writer to take such information into account when developing your other permit conditions.

* * *